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Phillip Edward Miller v. G. Barton Blackstock, Bureau Chief, Driver License Services, State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PHILLIP EDWARD MILLER, Petitioner/Appellant/ Cross-Appellee, v. G. BARTON BLACKSTOCK, Bureau Chief, Driver License Services, State of Utah, Respondent/Appellee/ Cross-Appellant.	**APPELLANT/CROSS-APPELLEE'S REPLY BRIEF** Case No. 20010306-CA (Lower Docket 000902138) Priority No. 15

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes

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STATEMENT OF THE FACTS

The Appellant believes that the facts as stated in his opening brief are accurate.

ARGUMENT

I. THE LOWER COURT CORRECTLY RULED THAT THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED.

Discussion

The government argues that the lower court incorrectly ruled that the petitioner's due process rights were violated. The appellant's believes that the lower court correctly ruled that the petitioner's due process rights were violated, however, the lower court incorrectly ruled that the violation was not fatal to the

revocation process. The government incorrectly relies on two United States Supreme Court cases in an attempt to persuade this Court that a police officer can deprive the petitioner of his driver's license at the time of his arrest without due process considerations.

Utah Courts have held that "the right to drive is a valuable right or privilege and it cannot be taken away without procedural due process." Ballard v. State, Motor Vehicle Div., Licensing Dep't., 595 P.2d 1302, 1304 (Utah 1979). The Utah Supreme Court stated that an opportunity to be heard in a meaningful way is at the very heart of procedural fairness. See In re Worthen, 926 P.2d 853, 876 (Utah 1996).

In this case the police officer revoked the petitioner's license at the time of the petitioner's arrest because the petitioner refused to submit to a breath test. The government acknowledges that the officer's actions violated the applicable statute. However, the government incorrectly argues that Mackey v. Montrym, 443 U.S. 1 (1979), stands for the proposition that the officer's conduct was not a violation of due process. In Montrym, the United States Supreme Court held that a statute which allowed the suspension of a driver's license for refusing to submit to a breath test was not void on its face as violative of the Due Process Clause. The statute at issue in this case and the statute at issue in the Montrym case are nowhere near similar. The deprivation of the right to drive however, is the same.

The government's reliance on the United States Supreme Court's holding in the Montrym case is misplaced. In the present case the statute states that if a

person has been placed under arrest for driving under the influence and then is requested to submit to a chemical test and refuses "a peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the Driver License Division, he shall . . . issue a temporary license effective for only 29 days." Utah Code Ann. § 41-6-44.10(2).

In Montrym, the statute at issue stated:

> [w]hoever operates a motor vehicle upon any [public] way . . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. . . . If the person arrested refuses to submit to such test or analysis, after having been informed that his license . . . . to operate motor vehicles . . . in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal [, which] . . . shall be endorsed by a third person who shall have witnessed such refusal[,] . . . shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made [,] . . . shall set forth the grounds for the officer's belief that the person arrested had been driving a motor vehicle . . . while under the influence of intoxicating liquor, and shall state that such person had refused to submit to a chemical test or analysis when requested by police officer to do so. Each such report shall be endorsed by the police chief . . . and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to

> operate motor vehicles issued to such person . . . for a period of ninety days. Mass. Gen. Laws Ann., ch. 90 § 24 (1) (f) (West Supp. 1979).

Mackey v. Montrym, 443 U.S. at 3.

The statute in Montrym, allowed for suspension of the driver's license without a pre-suspension hearing. However, suspension was only allowed when many prerequisites had been met and demonstrated by the police officer to the Driver's License Division. The suspension was not allowed to be done by the police officer as the government argues is appropriate in this case. Instead, the suspension was only allowed after a report had been prepared by a police officer, and endorsed by a third person who was required to have witnessed the refusal, and sets forth the grounds for the officer's belief that the person arrested had been driving the motor vehicle under the influence. Other requirements are mandated and stated in the statute. Once the Driver's License Division receives the police report, with the appropriate documentation, the Driver's License Division (registrar) then acts suspending the license. The statute in Montrym, is a lot different from the statute at issue in this case.

The government is correct that in Montrym, the United States Supreme Court allowed the suspension of a driver's license without a hearing, however, the government is incorrect in arguing that the Montrym case makes the holding in Bell v. Burson, 402 U.S. 535, 539 (1971), inapplicable to this case. The Court in Bell v. Burson, held that licenses "are not to be taken away without that Due

Process required by the Fourteenth Amendment." The Court in the Montrym, case did not state that when you refuse to submit to a breathalyzer that the Due Process Clause no longer applies, instead, the Court stated that the process provided by the statute - when compared with the property right and taking into consideration the small duration of the penalty (only 90 days suspension), that due process was not violated. In this case there was no process followed by the officer and the suspension is for a period of one year.

In this case the process was incredibly flawed, and was not statutorily mandated. There were no safeguards on the officer's actions and no police reports submitted for review with other officers as witnesses and their statements submitted also. The report was not submitted under penalty of perjury and there was no proof submitted that the petitioner was the person driving the vehicle. There was not any process at all provided to the petitioner. Instead, the petitioner was deprived of his driving privilege by the police officer at the time of his arrest without any meaningful procedural due process. This Court has said that "[p]rocedural due process entails procedural requirements, notably notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." In re N.H.B., 777 P.2d 487, 489 (Utah Ct. App. 1989). The Montrym case is not controlling in this case.

The government also argues that Dixon v. Love, 431 U.S. 105 (1977), supports the roadside revocation of the petitioner's driver's license without due process that occurred in this case. In Dixon v. Love, the Supreme Court ruled that

an Illinois habitual offender statute which provided for suspension of a license without a preliminary hearing upon a showing by records that the driver's conduct met certain criteria was not in violation of the Due Process Clause. The criteria at issue in Dixon v. Love was that the driver had been repeatedly convicted of offenses against traffic laws indicating lack of ability to exercise ordinary and reasonable care in the safe operation of a vehicle. In essence, the statute at issue in Dixon v. Love allowed for the automatic suspension of a driver's license when a certain number of points were obtained against the license. The statue did provide for a hearing after the fact.

The statute at issue in the case is nowhere similar to the statute at issue in that case although the right to drive is the same. In Dixon v. Love, the suspension only occurred after the prior driver's record had been investigated and verified. The Court found that the prior record was easily verified. The Court also determined that the risk of erroneous deprivation in the absence of a prior hearing is not great. The revocation decision was automatic and a matter of points and priors. Id. at 113. In this case a revocation decision would need to involve many factors the least of which consists of actual physical control and whether the petitioner was informed of the consequences of a refusal. See Ballard v. State of Utah, Motor Vehicle Division, 595 P.2d 1302 (Utah 1979)(to request a person to submit to a chemical test for alcohol a police officer must believe that the person was driving or in actual physical control of a motor vehicle); Lee v. Schwendiman, 722 P.2d 766 (Utah 1986)(in order to revoke a driver's license for a refusal to

submit to a breath test only proper when the individual has been informed of consequences of failure to submit). Dixon v. Love does not apply to the facts of this case.

The lower court correctly ruled that the petitioner's due process rights were violated. The facts of this case are that the officer did not issue the Appellant a temporary license and instead revoked the Appellant's license without any due process at all. The violation of the petitioner's due process rights should be fatal to the revocation process.

II. THIS COURT SHOULD HOLD THAT THE VIOLATION OF THE STATUTE IS FATAL TO THE REVOCATION PROCESS.

Discussion

The government concedes that the actions of the police officer in this case violated Utah Code Ann. § 41-6-44.10(2). Not only does the government believe that the violation of the statute was not fatal to the revocation process, the government believes that the remedy fashioned by the court was improper. The government proposes to this Court a remedy that would reduce the present court provided remedy and begin the year suspension at the time of the violation of the statute by the police officer. In essence, the government is asserting that there be no remedy at all for a violation of the statute.

If this Court were to follow the government's request the issue would then be, why does the statute exist at all if there is no remedy for a violation of the statute? Instead of being a statute, the statute would become a resolution, a hope, a

mere request by the legislature that the Driver's License Division operate in a certain manner. Contrary to the government's reading of the statute, the statute mandates compliance as a prerequisite to a deprivation of driving privileges.

The government's argument does not make sense especially when looking to this Court's prior treatment of violations of the statute at issue in this case. As stated in the Appellant's Opening Brief, this Court recently affirmed a lower court's holding finding a violation of this very same statute to be fatal to the revocation process. In Mabus v. Blackstock, 994 P.2d 1272 (Ut. App. 1999), the issue was the failure of the police officer to inform the petitioner of the officer's intent to revoke the petitioner's driver's license and the manner in which the petitioner could obtain a hearing as required in the same statute at issue here. The petitioner is requesting that this Court follow the outcome in Mabus and find that violation of the statute is fatal to the revocation process. As argued in Appellant's Opening Brief there needs to be a deterrent effect to officers to ensure that the statute is followed. The proper penalty should be that a violation of the statute is fatal to the revocation process.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellant's Opening Brief, the appellant respectfully requests that this Court reverse the lower court as to the remedy it fashioned after correctly finding a Due Process violation. The

Appellant asks this Court to rule that the proper remedy is a finding that the violation of Appellant's statutory and due process rights by the police officer is fatal to the revocation process and any suspension of the Appellant's driver's license was improper.

RESPECTFULLY SUBMITTED this 9th day of August, 2001.

Benjamin A. Hamilton
Attorney for Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I Benjamin A. Hamilton, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, Fifth Floor, 140230, Salt Lake City, Utah 84114-0230 and 2 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 7th day of August, 2001.

Benjamin A. Hamilton